No. 118.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

BROWN SHOE COMPANY, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF

For Brown Shoe Company, Inc.

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QUESTION PRESENTED.

The Commission's statement of the question presented places undue emphasis on reference in the Court of Appeals' opinion to the decision in the case of *Federal Trade*

Commission v. Gratz, 253 U. S. 421, 427, and implies that the reversal was based primarily upon this Court's decision in the Gratz case.

We suggest that, more properly stated, the question presented is whether the Court of Appeals erred in reversing the Commission's decision on the ground that (a) there was no evidentiary basis for the Commission's finding that the Brown franchise stores program was akin to an unlawful tying arrangement and (b) that there was a complete failure to prove an exclusive dealing agreement which might be held violative of Section 5 of the Federal Trade Commission Act.

STATEMENT.

1. The Facts.

A. Brown Franchise Program.

At the outset, we point out that the term "franchise" is a complete misnomer, there being nothing in the nature of a franchise involved. When the program was first commenced in 1921 or 1922 (R. 108), the present "Franchise Stores Division" of Brown Shoe Company, Inc. (hereinafter "Brown") was known as the "Store Plan Division". Then it was the "Brown-Bilt Division" or "Brown Plan Division". Approximately fifteen (15) years ago, the name of the Division was changed to the "Brown Franchise Division," simply because they thought the Brown Franchise Division was a better name (R. 169).

(a) **Summary statement of the plan and its purpose.**

The Brown franchise plan is nothing more than a program, plan, or policy whereby Brown agrees that so long as a dealer concentrates his business within the grades and price lines of shoes sold by Brown, i. e., carries an adequate and representative stock of such shoes and handles them in a representative manner and operates a modern up-to-date store, Brown will give to the dealer certain extra benefits and services hereinafter described over and above the benefits and services given to dealers who purchase shoes from Brown, but do not concentrate on Brown lines.

It is comparable to the Friendly Franchise Store Plan of General Shoe Corporation, offering somewhat similar benefits and services (Resp. Ex. 7; R. 550, 878) to the independent retail dealer, and under which, as the Commission has stipulated (Resp. Ex. 7; R. 550, 874): "In order to ob-

tain the benefits and services available under the program, a friendly franchise dealer agrees to purchase sufficient quantities of footwear from General, in each type of shoes (men's, women's and children's) he carries, as are necessary to assure the presence of an adequate and representative stock of merchandise in the friendly franchise store at all times." Likewise, it is comparable to the Merchants' Service Plan of International Shoe Company, offering somewhat similar benefits and services (Resp. Ex. 7; R. 550, 876) to the independent retail dealer, and under which as the Commission has also stipulated (Resp. Ex. 7; R. 550, 873), "In order to obtain the benefits and services available under the program, a Merchants' Service Dealer agrees to feature the shoes of a Division of International, in each type of shoes (men's, women's and children's) he carries, and at all times to handle such shoes in a representative manner." The Commission has also stipulated that some or all of similar benefits and services are made available, to a greater or lesser degree, at no cost or a nominal cost, by virtually all other manufacturers of branded shoes in competition with Brown, to retailers who will carry the branded shoes of such manufacturer or manufacturers in a representative manner and with adequate inventory (Resp. Ex. 7; R. 550, 874-5).

The purpose of the plan is primarily to help the dealers to do a "better retail job" (R. 99, 101); "to help that merchant do a better merchandising job and be successful in what he has set out to do" (R. 100). The fieldman "is interested in them being successful and making a profit" (R. 312). Obviously Brown is not purely altruistic in carrying on this program. It does Brown no particular good to make a single sale to a dealer, or to sell a line of shoes, if those shoes are not resold by the dealer and sold at a profit. As one of the Commission's manufacturer's witnesses said, "the initial order * * * is unimportant. It doesn't mean anything * * *. The initial

order is not important'' (R. 144). By helping the dealer to sell Brown shoes at a profit, Brown not only hopes to keep him in business but to keep him as a steady customer of Brown.

(b) **Written agreements discontinued.**

For many years, Brown and the independent retail dealers who were on the program signed some sort of a written agreement, a copy of the last form being attached as Exhibit A to Brown's answer to the Complaint (R. 12-15). The use of a written agreement was discontinued ''in recent years'' (R. 19), although the exact date of such discontinuance does not appear in the Record. In 1958, there were about 321 franchise dealers who had signed written agreements (R. 754). As of November 20, 1959, there were only 259 dealers on the plan who had signed written agreements and 423 dealers were operating on the program without having entered into a written agreement (R. 773). By October 31, 1961, there were 766 or 767 stores on the program (R. 573), so that by then, at least some 507 or 508, or approximately two-thirds of the dealers were on the program without having signed any written agreement. Obviously by the present time, the percentage of dealers on the program without any written agreement is still higher, and with normal turnover, will eventually be 100%. The operation of the program is exactly the same for the newer dealers who have signed no agreements as for the older ones who have (R. 19, 101, 122).

(c) **Dealers only required to "concentrate" on Brown lines.**

Whether by written agreement or by Brown policy under the program, the dealer is not required to deal exclusively with Brown, or to buy 100% of his requirements from Brown, but only to ''concentrate'' his business

within the grades and price lines of Brown shoes. Nor does the agreement or policy prohibit the dealer, even by its letter, from purchasing "shoes" from other manufacturers even though they may conflict in pattern and price with some of the shoes manufactured by Brown. The language in the agreement upon which the Commission places such emphasis merely provides that the dealer will have no "lines" conflicting with Brown Division Brands of the Brown Shoe Company. A "line" is not a shoe or a few odd shoes, but is a group of women's shoes, men's shoes, or children's shoes sold under a single brand name and a general line is one that has breadth and depth in selection of pattern, type, heel height, and comparable in price (R. 120-1).

A visual representation of what is meant, in part, by a "line" is found in the In Stock Wall Chart of Brown's Air Step line (Com. Ex. 6, R. 599-600). These are the shoes of that particular line which Brown carries in stock and from which dealers can be supplied periodically from week to week and from month to month (R. 571). Other shoes in the Air Step line which are not carried in stock for fill-in orders, but have to be made up on receipt of dealers' orders (R. 571), are not shown on this chart.

As long as the dealer elects to remain on the program, he receives certain benefits, summarized in the last form of written agreement (R. 12-13), most of which, as the Court of Appeals expressly held, are available to all dealers who purchase Brown shoes whether or not on the program (R. 586).

Any saving resulting from group insurance is a saving given by an unrelated insurance company, not by Brown. Comparable savings are available to anyone who joins a comparable group program acceptable to an insurance company. As of November 19, 1959, of the 682 Brown franchise stores only about 263 elected to participate in

the group life insurance and about 409 in the group casualty insurance (Com. Ex. 121; R. 123, 771-779, l. c. 774). Some of the dealers who were not purchasing the group insurance testified that they could get insurance just as cheap or cheaper locally (R. 376, 380, 406, 430).

The Commission is correct in the statement (Com. Br. p. 6) that the "franchisees also enjoy substantial discounts on canvas and waterproof footwear manufactured by U. S. Rubber Co.," but they enjoy no greater discounts than dealers who are not on the program. There was a time, from 1950 to October 21, 1955, when Brown represented to franchise dealers that they would receive discounts over and above those if purchased directly from U. S. Rubber Co. But it developed that Brown could not be sure what discounts were being made available on purchases direct from U. S. Rubber Co. (R. 119-120); that U. S. Rubber Co. gave the same discounts to dealers after they had ceased to be on the franchise program (R. 433-436, 529); and that other rubber manufacturers were offering similar discounts to the dealers (R. 407, 430, 433, 445, 462, 475, 522). These representations ceased after October 1955.

(d) **Heart of the program—services to dealers.**

But the very heart of the program, and the thing which is of the greatest benefit to the dealers, is the assistance which Brown gives to the dealers, which may be divided into two classifications.

First, there are services rendered at or from Brown's home office, in analyzing the dealer's reports, writing the dealer "on many occasions as they see certain strengths of his business and compliment him on certain phases of his business, or if they see weaknesses that might be cropping up in the business, to point those things out to him and recommend that he take steps to strengthen his position in certain phases of his operation, whether it be

merchandising or financing or whatever the specific case might be" (R. 113); sending out "periodically to the franchise stores suggested ideas on merchandising, preparation for clearance sales, preparation for peak seasonal periods of the year" and "also working up at the request of dealers, financial guides that would help them in the guidance of their business financially" (R. 107).

Second, there are those rendered in person by the fieldmen at the dealer's prospective or actual place of business wherein they would "counsel with a prospective dealer who is considering a location, to assist him in making a survey for that location and review the lease that the landlord might submit to that man as a prospective tenant, to give the prospect his opinion regarding any clauses in that lease that he would recommend the prospect to go back and discuss with the landlord" (R. 110); "Many a dealer is the owner, his wife is interested in it with him, and he is not too highly skilled in making deals with the landlord. So he is helped in that situation to know how much he should pay or what kind of an arrangement he should make. Because if a lease on a retail business is too high, it is extremely difficult for that merchant to do a decent service job for his community so he is helped in that sense" (R. 101); "Giving advice and suggestions or (sic) merchandising, sales promotion, personnel, accounting and record-keeping, and other matters pertinent to the conduct of a profitable retail shoe business * * * upon request, conduct a sales clinic or a salesmanship lecture for the store personnel. Such a lecture may be accompanied by recordings to shoe store salesmen how to sell more shoes" (Com. Ex. 121; R. 774); he can be an auditor from the "stand-point of helping them with their figures as they need them. Or he can help them lay out a buying plan, to set up figures for certain kinds of shoes so his money is divided out in such a way that he can do the very best retail job

without having the pressure of selling attached to it" (R. 100).

Boiling it down, "the fieldmen's services are to observe, analyze and recommend, but not to dictate" (R. 110). In substance, these fieldmen help the dealer to "merchandise" his shoes more intelligently, more efficiently, and more profitably.

(e) **Inability to help merchandise conflicting lines.**

The fieldmen, not being familiar with the lines of other manufacturers, cannot be of much help to dealers in the merchandising of such other lines (R. 268, 273, 301, 309, 319).

Counsel for the Commission conceded this point by saying to the witness (R. 271), "I know that you can get more use out of the fieldman [by concentrating on Brown lines] because he can work on all your lines."

As one of the dealers testified (R. 268): "I think the more Brown shoes you carry the more help your Brown fieldman can be to you. Suppose I was buying Red Cross [manufactured by a competitor of Brown] shoes and Naturalizer [a Brown brand] shoes. Suppose I continued that and my operation was big enough to continue that. I don't think the Brown fieldman could be of much help in buying Red Cross shoes. I don't think he knows the line well enough to be of much help to me."

A fieldman testified (R. 301) that he is acquainted with the performance of the Brown lines in the stores in his territory; he has information with regard to styles and patterns of Brown lines; the company periodically sends out information on the best sellers; he gets performance indication in regard to particular styles of Brown shoes; that information aids him very materially in his work as a field representative; and he is in a position to pass that information on to the dealer; that is an important

function of his services as a fieldman. But (R. 301) "he cannot do that with respect to other brands, manufacturers' lines of shoes. He has no knowledge of how they are performing."

Another fieldman testified that there are constant style changes, particularly in women's shoes, and fashion consciousness on the part of the women customers, and that he is able to give the dealer advice on that score (R. 309), "For example, they are sent from the office a list of the twelve best-selling patterns in each line of shoes. The lines referred to are all Brown Shoe Company lines * * *. He is more familiar with Brown shoe lines. He does not have that same information, for example, on Red Cross shoes, as the information that he gets from his home office on Brown shoes" (R. 310). "Then when he calls on a dealer and helps him on his buying guide, he as a fieldman is informed as to the performance of Brown shoes particularly, and that information is important" (R. 319), "he is not in the same position to give the same type of counsel and advice with regard to brands of the other manufacturers. He is unfamiliar with them. As to whether this has any effect on his ability to counsel with the dealer on his over-all operations of his store, the witness said, I would be able to give a dealer much more help in counselling and guidance in lines with which I am familiar than the other lines that he is carrying in the store because the only thing I would have to work with would be his pairage guide on the back of his monthly report and buying guide. I have no idea of the style, pattern or service policies or what have you of other lines than those I work with.

And Mr. J. R. Johnston, the head of the Brown Franchise Division, testified (R. 167-168) with respect to lines of other manufacturers:

> "We are not familiar with that line, how that line functions, and its services and style not as we are

familiar with our own Brown brand. So we are just not in a position to sit down and work with that man and discuss the intimacy of his business, the segments of his business, because we are not familiar with the lines' functions that he might be buying, that are in direct conflict with our line. The witness has reference to the activities of the fieldman under the franchise program in dealing with the store owner."

By and large, each fieldman has a multi-state territory and will visit the stores in his territory from two to ten times a year (R. 20).

The Brown Franchise Stores Division does not sell shoes nor do the fieldmen. They sell ideas, so to speak (R. 106). The shoes are sold by salesmen operating out of the Brand Divisions of Brown which are selling divisions (R. 106), and a separate salesman will call on each franchise dealer representing each separate brand line sold by Brown to that dealer, so that if the dealer carries three Brown lines, he will be solicited by three Brown salesmen (R. 18).

Fieldmen are compensated by salary and their expenses. Their remuneration is not keyed to the sales of their stores (R. 110). On the other hand, Brown's salesmen who call upon dealers, whether they are on the franchise program or not, are compensated on a commission basis (R. 102).

A number of factors enter into the selection by a shoe retailer of the brands or lines of shoes to be carried in his store. However, the basic criterion, to which all other factors relate, is the performance of the line, i. e., how it sells, and the profit to be gained from selling the line. It is a fundamental fact that shoe dealers, like other merchants, are in business to make a profit. Thus, they want lines of shoes that sell well and sell at a profit (R. 257-8, 276, 336-7, 414, 497).

(f) Difficulties of shoe retailing and line concentration.

Shoe retailing is a highly competitive and difficult business in which to make a profit, and to be successful requires considerable skill (R. 100). The inventory of merchandise is very important to every shoe retailer. Lines of shoes are normally separated by type according to the persons for whom they are intended; i. e., men and boys, women, growing girls and children. Each style of shoe carried within a brand line must be stocked in varying lengths, widths and colors, and for women's shoes different heel heights and materials. Commission's Exhibits 6 and 7 (R. 103, 599-601) demonstrate the large number of shoes necessary for adequate inventory coverage in just one style of a particular brand. Variations in size and width alone commonly run between 50 and 100 different size-width combinations. In addition, there are different colors or leathers in which the shoe is available.

A relatively large number of pairs must be stocked for every color and style of shoe offered for sale by a dealer. Furthermore, many of these sizes must be stocked "in depth" by the dealer so that he can sell the same size shoe in any one style and color to more than one customer without having to wait for his stock to be filled in by another re-order. Shoe sizes more commonly encountered in his customers require this greater depth of stock (R. 291, 317). A successful dealer learns to anticipate the demand for these sizes in his community through prior experience (R. 253-4).

Because of the number of sizes and styles required to stock a modern shoe store, the practice of line concentration by a dealer necessarily includes the avoidance of conflicting lines, shoes that are similar in price, quality and style, whereby the dealer would be in competition with himself with another brand of shoes (R. 498, 504). The presence of conflicting lines in a store almost always leads

to duplication of styles (R. 253, 292, 346, 427). The practice of line concentration by a shoe dealer reduces or eliminates this duplication of styles in the same type and price of shoe, enables the retailer to carry a sufficient range and depth of sizes, and increases the number of times the merchant can turn his stock over during the year thereby increasing his return on his capital investment (R. 300, 312, 317-8, 398-9, 513).

Line concentration is rarely, if ever, practiced in a pure form. Nonetheless, for the successful independent family shoe store it is an established principle of good retailing in the shoe industry, and serves to lessen the inventory problems and increase the profits of shoe retailers who practice it (R. 256, 332-3, 352, 457). As one witness put it,

> "It's almost a maxim in the shoe business that a greater degree of concentration produces a greater degree of profits" (R. 322).

Some dealers by reason of their many years of experience are already skillful merchants and do not need outside advice in these matters, but the services of field men are needed by many dealers because shoe retailing is not a simple matter. As William E. Freeman, one of the Commission's manufacturer's witnesses said twice, "Dealer's need help * * *" (R. 206, 211).

The program is not entirely a one-way street. In addition to concentrating his business on Brown lines, the dealer is called upon to "operate a modern, attractive store at all times, staffed by efficient personnel and backed by adequate capital;" provide for a local advertising budget and to "promote and merchandise aggressively to secure maximum volume;" to carry full insurance on the stock and fixtures; to maintain and use Brown's Merchandise Record System; to use and keep current the complete accounting and bookkeeping system provided by

Brown; to make regular monthly reports; and not to encumber the stock or fixtures by chattel mortgage, or otherwise, etc. (R. 14).

(g) Plan terminable by dealers at will.

The Commission states (Com. Br. p. 6) that "The franchise agreement is terminable by either party upon 30 days' notice, * * *." The Commission fails to point out, as the Court of Appeals expressly found not once but twice, that the arrangement, whether evidenced by a written agreement or as embodied in the program, is terminable at will, saying (R. 586), "Retailers were free to abandon the arrangement at any time they saw it to their advantage so to do", and (R. 589) "Brown has not 'acquired' the retail outlets of those who join its program. The latter are free to leave it at any time."

Not only are the dealers free to withdraw from the program at will, but they actually do so. Usually such termination is accomplished without formal notice to Brown, by the dealer simply purchasing other lines of shoes and not reordering Brown lines of shoes in their place, accompanied by a failure to send in his monthly reports (R. 529-30). The formal termination of the arrangement between Brown and a dealer is usually nothing more than a confirmation by Brown of a *fait accompli* previously consummated by the dealer. The 30-day notice provision was one inserted for the protection of the dealer so as to assure him ample time to replace any insurance he might be carrying under the program (R. 170), and this 30 days was extended when required (R. 116-7).

The shoes purchased by dealers on the Brown franchise program are sold at the same prices and upon the same terms as those sold to all other customers of Brown (R. 100, 106, 117-118, 566), and dealers leaving the Brown

franchise program are not only permitted to, but in most instances do, continue to buy Brown shoes thereafter, also at the same prices and upon the same terms (R. 117, 530).

(h) **Beneficial results to dealers.**

Brown feels that the program "has been very beneficial, we think, to many merchants, and it has been beneficial to our company in our relations with our customers" (R. 100-101). Some measure of the extent of the benefit to the dealers is found in the fact, expressly found by the Commission (R. 72) and as pointed out by the Court of Appeals, "Brown franchise dealers were successful, having an average rate of return of 16% against an average return of other independent shoe dealers in America of 11.8%" (R. 591). This probably explains why, as the Commission pointed out, "the relationship between Brown and its franchisees is a reasonably stable one." (R. 63).

B. **Effect of the Restrictive Provisions.**

The Commission contends that the effect of the "restrictive" provisions was to cause dealers on the plan to exclude conflicting lines and to purchase, on the average, 75% of their total shoe requirements from Brown, thereby foreclosing such retail outlets to Brown's competitors, particularly small manufacturers. There is a question as to which is cause and which is effect,—whether or not the provisions of the plan cause the dealers to concentrate on Brown lines, or whether they go on the plan and obtain the incidental benefits because they are already sold on Brown shoes and have already decided to concentrate on Brown lines. Every dealer who was asked the question testified, in effect, that he purchased Brown lines and concentrated on Brown lines because he was "sold" on Brown shoes (R. 293, 349, 352, 376, 384, 420, 424, 427, 454, 483, 489, 507), and that he would quit concentrating on Brown lines and would purchase other and conflicting lines whenever he

thought that he could do better with them (R. 292, 340, 376, 420, 424, 458, 478, 499, 503, 513). Even the Hearing Examiner conceded that the quality of the shoes, rather than the benefits of the plan, was the first consideration affecting the dealer's decision (R. 172). But regardless of the question as to which was the cause and which was the effect, the fact remains that the dealers on the plan did concentrate their business on Brown lines, buying from 60% to 95% in individual cases, and on the average 75%, of their total shoe requirements from Brown, with some undefined portion of the remainder, consisting of shoes retailing at a higher or lower price than those available from Brown (R. 63). According to the Outside Line Survey (Resp. Exs. 11-13; R. 564, 888-899, l. c. 890), five out of six dealers on the plan carried shoes which did directly conflict with Brown brands, and in some cases, more than one conflicting brand. Thus, although these five out of six dealers were not, in most cases, carrying complete conflicting lines, but only selected models from such lines the manufacturers of such conflicting lines had direct access to the dealers on the plan. Each such manufacturer had his foot in the door, and was in a position to sell to the dealer his complete conflicting line whenever he or his salesman could convince the dealer that he could do better with such line than with Brown's line.

1. The Commission's Six Manufacturer Witnesses.

In order to support its contention that the effect of the Brown franchise program was to foreclose competing manufacturers from the market represented by the Brown franchise stores, the Commission offered the testimony of only six witnesses. These were officers or representatives of six competing manufacturers, who testified, generally speaking, to the loss of customers, which losses they attributed to the program and to their difficulty in selling to dealers on the program, i. e., their difficulty in getting

such dealers to throw out Brown lines and substitute their own.

All of these witnesses conceded that it was perfectly normal in the shoe business to have a turnover in retail customer accounts—accounts being added when their salesmen were successful, and lost when salesmen from competing manufacturers were successful (R. 139, 157, 194, 210, 229, 243). While they complained of their difficulty in getting their lines into Brown franchise stores in place of Brown lines, they admitted that a salesman always has a problem in trying to introduce a new line into the store of any dealer who already had a line with which he is getting satisfactory results; that in such situations there is sales resistance if the lines are comparable insofar as quality, styles and patterns are concerned; that it is a part of doing business for the salesman to go out and try to sell his line of shoes in preference to some competitor's line, and that it takes real skill for a salesman in selling a dealer who is already carrying a competing line to persuade that dealer to replace it (R. 138, 194, 210, 227, 229, 245).

It may be conceded that competitors of Brown are not satisfied with their sales to Brown franchise stores. Few companies are ever really satisfied with their sales results, but the actual financial results showed that only one of six companies, Deb Shoe Company (hereinafter "Deb"), was really suffering from declining business (R. 145), and as will be pointed out below, the reason for such loss of business was not connected in any way with the Brown franchise program. Of the other five, Weyenberg Shoe Manufacturing Company's (hereinafter "Weyenberg") 1959 earnings were record earnings for the company, 10.3% more than in 1958 (Com. Ex. 89-B; R. 91, 741) and were in excess of 6.5% of sales (R. 226), and Weyenberg's balance sheet as at December 31, 1959,

showed current assets of $9,413,800 and current liabilities of only $1,530,696, a ratio of nearly six to one (R. 226).

Juvenile Shoe Corporation of America (hereinafter "Juvenile") had been growing as far as shoes produced and shoes sold, sold 7.2% more pairs of shoes and 7.1% in dollars (Com. Ex. 89-B; R. 91, 741), in 1959 than it did in 1958, and the general financial condition and net worth of the company was continuing to grow throughout the years, including the current year, compared to last year (R. 139).

Freeman Shoe Corporation (hereinafter "Freeman") not only had an increase of 5.1% (Com. Ex. 89-A; R. 91, 740), in the number of pairs of shoes sold and an increase of $835,000 (Com. Ex. 89-A-B; R. 91, 740-1), in 1959 over 1958, but the company's sales in dollars in 1959 were the highest in the company's long experience (R. 208).

Huth-James Shoe Company (hereinafter "Huth-James"), a manufacturer of men's and boys' shoes, who did no national advertising, had an over-all increase in their business over the last five years (R. 193), in spite of the fact that the national per capita sales of men's shoes had been down slightly in the last ten years (R. 197).

Leverenz Shoe Company's (hereinafter "Leverenz"), a manufacturer of men's and boys' shoes, which did no national advertising (R. 245, 246) dollar volume was without a doubt up in 1959 over the preceding year (R. 243).

As for Deb Shoe Company, it did not commence business until 1946 but by 1959 its sales were around $9,000,000 (R. 145). Its business was off from 1958 but we submit that the reason why its business was falling off was not due to the Brown franchise program or similar programs by other manufacturers, but rather to their own internal production problems. Thus, Robert P. Howe, the proprietor of Howe Shoes, Inc. of San Bernardino, California, testified that his store had been on the Brown franchise store

program for twenty-two years (R. 397); that he has been carrying Deb shoes ever since 1946 or 1947, and does so because they produce a type of footwear which fits his merchandising program; that the line performed well the first few years, but after that the fitting qualities deteriorated to the point where his mark-downs on them became extensive; that, accordingly, he had transferred some of his business "in flats" which he had been purchasing from Deb to other manufacturers; that he still buys some Deb shoes and Brown has never attempted to prevent him from doing so (R. 400). Again, Edward Bomar testified that he is Vice President of Bomar, Inc., although no longer in the active management; that Bomar operated four stores in Mississippi; that in 1948, while their stores were on the Brown franchise program, they bought Deb shoes which they carried until about 1953; that they did "real well" with the shoes for a couple of years but Deb got later and later with delivery dates, the quality and workmanship began to deteriorate, and finally they couldn't get along with the Deb people at all and had to drop them (R. 323); that "the shoes had become poor-fitting shoes. They had so much work that it was coming out of their ears, and they couldn't deliver shoes on time, and they were ramming them through the factory, and they were coming out very shoddy. These were all contributing reasons as to why they dropped Deb shoes" (R. 325). When the line was dropped they replaced it with shoes from another manufacturer, not Brown (R. 323). This testimony as to dealers' problems with Deb's shoes was not contradicted.

Furthermore, the testimony of these six manufacturer witnesses was based primarily upon hearsay, upon statements or reports of their respective salesmen as to their reason for having lost business or being unable to get business, and there was little causal connection shown between the loss of business and the Brown franchise plan in the specific instances which they cited.

Thus the Commission, obviously selecting the three examples deemed most favorable for its purpose, cites (Com. Br. pp. 8-9) as evidence of the foreclosure of Brown's competitors, first, the fact that Leverenz Shoe Company, "sold one retailer [Meyers Shoe Store, Watertown, Wisc.] $2,399.12 worth of shoes in 1955, but lost the account altogether in 1957 when the retailer became a Brown franchisee (R. 65)." But the Commission fails to point out that although this particular dealer did not join the Brown plan until August, 1956, the dealer wrote to Leverenz on March 8, 1956, some five months earlier, cancelling orders from Leverenz because, "I find I am over-bought and can't afford to pay for them" (R. 847). Next, the Commission cites (Com. Br. p. 9) the fact that Weyenberg Shoe Company "saw sales to two of its accounts drop from $8,388 to $186.00 and from $2,782 to zero, respectively, when the dealers joined the Brown franchise program and agreed to drop conflicting lines (R. 65)." But the Commission fails to point out that in the case of the first dealer there had already been a substantial drop in the dealer's purchases (from $8,388 n 1953 to $3,219 in 1954), and the dealer did not go on the plan until May, 1955. Obviously, the dealer was dissatisfied with the results he was getting from Weyenberg shoes well before he joined the plan and that was probably an important factor in causing him to do so. In the other case, the dealer was not an established customer of Weyenberg, having made his first purchase in November, 1957, and joined the Brown plan within fifteen months thereafter. In connection with Weyenberg the Commission also entirely disregarded the testimony of Victor Vandenburgh, who operated two shoe stores at Portland, Oregon, on the Brown Franchise Program. Mr. Vandenburgh testified that his principal line of men's shoes in both stores was Weyenberg, and that no one from Brown ever told him he could not carry the Weyenberg shoe line because they are a Brown franchise

store (R. 517). Finally the Commission cites (Com. Br. p. 9) the fact that Juvenile Shoe Corporation who "had formerly sold as many as 1,530 pairs of shoes annually to a shoe store in Plymouth, Michigan, suffered a decline to only 188 pairs following the store's enrollment in the Brown plan (R. 65)." But an examination of the detailed information in the record with respect to this dealer, Fisher Shoe Store of Plymouth, Michigan (Com. Ex. 138-A, R. 813) will show that he joined the plan in December, 1952 (R. 65) but continued each year until 1959, the last year shown, to purchase substantially the same amount of Juvenile's "Clinic" brand shoes, which compete directly with two of Brown's brands, and that the decline in purchases is only in children's shoes, which were presumably supplanted by one of Brown's lines of children's shoes, although there is no direct evidence in the Record to that effect.

The other testimony of these witnesses, not cited in the Commission's Brief, gives little or no support to the Commission's contention that competing manufacturers were foreclosed from Brown franchise stores, and, in many instances, affirmatively shows that there was no such foreclosure.

Thus Charles Arend, of Juvenile, produced a list of twelve stores (Com. Ex. 138, R. 134, 813-814), which he said were Brown franchise stores which had either stopped buying from him or significantly curtailed their purchases. The list shows continuing purchases by every store on it of Juvenile's Clinic shoes, which compete directly with parts of Brown lines (R. 182). While five of the stores on the list show no purchases of Juvenile's Lazy Bones shoes (R. 813-814), there is no evidence that any of these five stores had ever purchased Lazy Bones shoes before they went on the Brown franchise program. One of the stores, Kerr's Shoes of Monroe, Wisconsin, shows varying purchases of Juvenile's Lazy Bones shoes

from 1956 through 1959, apparently in no way related to the fact that it became a Brown franchise store April 6, 1955 (Com. Ex. 141, R. 214, 835), nor is there any evidence as to whether or not it purchased any of such shoes or how many, before going on the program. Houston's Shoe Store, Berkeley, California, made substantial purchases of Juvenile shoes every year from 1954 through 1959 (Com. Ex. 138-A, R. 134, 813). The R. L. Holmes Shoe Store of Morristown, Tennessee, became a Brown franchise store in 1928 (Com. Ex. 138-B, R. 134, 814), and yet it was still buying Juvenile shoes in every year from 1956 through 1959.

Mr. Arend offered no evidence of any causal connection between any loss of sales by Juvenile to Brown franchise stores and the provisions of the Brown franchise plan. On the contrary, direct evidence as to the reason why Juvenile was losing sales was given by the testimony of three dealers. Don A. Hanson, Manager of Hudson Shoe Stores, Inc., of Burley, Idaho, testified that his purchases of Clinic shoes from Juvenile had decreased because of Juvenile's policy of refusing to take back shoes when manufacturer's defects showed up in them; that he had put in a companion line of another brand (not one of Brown's) and that the increase in his sales of nurses' oxfords was in such line (R. 491).

William B. Howard, the owner of a Brown franchise store in Hillsboro, Illinois, testified that after seeing the Clinic line at a shoe show in St. Louis he wrote to Juvenile asking for a salesman to call on him and sent them an order for 32 pairs of Clinics in two styles worn by nurses at the hospital in Hillsboro (R. 285-286). Mr. Howard received a letter from Juvenile advising him that the company was not in a position to serve him at this time (Respond. Ex. 1, R. 276). He heard nothing further from Juvenile after receiving that letter (R. 276).

Orville Shugarts testified that his company, Heydrick Shugarts, Inc. has two stores, one in Clearfield, Pennsylvania, and the other in Phillipsburg, Pennsylvania, one of which had been on the Brown franchise program since 1935 and the other since 1956; that they have been carrying Juvenile's Clinic shoes in both stores since 1956; that when they opened the store in Phillipsburg in 1956 a hospital located in that town required the freshmen, or first-year training nurses, to wear black shoes rather than the women's white shoes normally worn by nurses, such as Clinic shoes; that the black shoe was not available in the Clinic line but was available in Juvenile's Lazy Bones line, and, accordingly, they purchased a number of such shoes. However, the following year, the hospital changed the regulation so that it was no longer necessary to buy black oxfords and the store discontinued Juvenile's Lazy Bones shoes. It had nothing to do with the store being a Brown franchise store, and no one from Juvenile had ever tried to sell him Lazy Bones shoes as a line (R. 541-542). He further testified that his records showed that while his purchases of Clinic shoes had declined in 1958 and 1959, this was due solely to depressed economic conditions in their area (R. 543).

In spite of this testimony with respect to the alleged difficulty his salesmen had in selling to stores on the Brown franchise program, the uncontradicted evidence showed that Juvenile was selling 68 out of 573, or approximately 12% of Brown franchise stores (Resp. Exs. 11-13; R. 564, 888-899, l. c. 892), as compared with only 2500 or 2600 out of the nation's total retail outlets of 70,000 or approximately 3.7% (R. 137, 97).

Mr. Jack Altman, of Deb Shoe Company, testified that he had not personally called upon a Brown franchise store and tried to sell it shoes in four or five years (R. 153); that he had no chance to sell Deb shoes to Brown franchise stores (R. 151); but later admitted that Deb does, in

fact, sell to some Brown franchise stores (R. 151, 153, 154). He gave the names of a few franchise stores which he said he had sold at one time but not any longer, among which were the Hill & Shipe Stores (three in Oklahoma and several in Texas (R. 391)), Howe's Shoes at San Bernardino, California, and Bomar's at Jackson, Mississippi (R. 151, 153, 154).

The reasons why he no longer sold these stores were disclosed by testimony of the operators. Guy Shipe, the partner of the Hill & Shipe Shoe Store, testified that they started buying Deb Shoes for their stores after World War II and while they were on the Brown franchise program; they later stopped purchasing Deb shoes because the shoes weren't making any money for them (R. 391); Brown had nothing to do with it (R. 391). The testimony of Robert P. Howe and Edward Bomar has been outlined above.

Among other things, Mr. Altman testified that he had visited a "100 per cent" Brown franchise store called "Quality Shoe Store" in Brunswick, Georgia about two months before he testified (R. 159-60). Brown has no such franchise store, nor did it ever have (R. 565-6). The uncontradicted evidence showed that Deb was selling 15 out of 573, or approximately 2.6% of Brown franchise stores (Resp. Exs. 11-13; R. 564, 888-899, l. c. 890-1) as compared with only 1600 to 1700 out of the nation's total retail outlets of 70,000, or approximately 2.3% (R. 146, 97).

Harold Laverenz, of the Huth-James Shoe Company, testified that he obtained his information about the Brown franchise plan from his salesmen and accounts he had called on (R. 188); he could not think of any of the names of any accounts of Brown franchise stores on the list in evidence (Com. Exs. 23-24, R. 108) which either he or his salesmen had called on in the last four or five years and attempted to sell (R. 191), he did not remember calling on

any Brown franchise stores except one when he was a salesman (R. 188, 191); he did not recall the names of any Brown franchise stores except one—that of Passmore at Sault Sainte Marie, and that name was suggested to him by Commission counsel (R. 190). The record shows no such Brown franchise store as Passmore at Sault Sainte Marie (Com. Exs. 23-24, R. 108).

William E. Freeman, of Freeman Shoe Corporation (Freeman), first testified that none of the stores on the list of Brown franchise stores (Com. Exs. 23-24, R. 108) were currently substantial customers of Freeman, and as to the market represented by these stores, said: "Well, we have access to it but we don't participate in it, for some reason or other" (R. 205). However, he later admitted that Freeman sold certain specific stores which were called to his attention (R. 208-10); that he did not know whether Freeman was selling to certain others (R. 208-10); and admitted that his examination to determine whether Freeman sold to Brown franchise stores had been a "rather cursory one" (R. 209). Actually, the uncontradicted evidence shows that Freeman was selling 24 out of 573 Brown franchise stores (Resp. Exs. 11-13; R. 564, 888-899, l. c. 891). He cited four instances as to which he had been "informed" that the company had lost business because the account involved became a Brown franchise dealer. In most there was no correlation in point of time, and in no case was there any substantial evidence of a causal connection between the loss of the business and Brown's franchise program. Thus, he testified that during the period of 1948 to 1951, he sold Freeman shoes to the Hub Shoe Store in Shelbyville, Indiana, and that at the time he left in 1952, Freeman was shipping approximately 800 pairs a year to that shoe store (R. 203). However, it is undisputed that Hub Shoe Store went on the Brown franchise program on January 10, 1950 (Resp. Ex. 14-A and B; R. 565, 900), so that Freeman's substantial sales to the store

continued for some three years thereafter. He testified that Freeman ceased selling a store known as Jo-Mar Shoes, Inc., in LaSalle, Illinois, early in 1959 (R. 203). But the previous owners of the store, whom Freeman had been selling, sold out in 1958 and the new owners did not go on the Brown franchise plan until December 17, 1959 (Com. Ex. 141-G; R. 214, 822). He referred to declining sales to a store known as Wells Shoe Store in Ferguson, Missouri, and another known as Juels in Brookings, South Dakota (R. 203-204), but these stores did not go on the Brown franchise plan until a couple of years after a significant decrease in the purchase of Freeman shoes had occurred (Com. Ex. 141-K and Q; R. 214, 826, 832).

He admitted that, with respect to the additional services, such as the type Brown may offer "dealers need help * * *", but it would be too costly for his company to furnish such services because they are exclusively a men's dress shoe manufacturer and it would not be logical to provide such services for the dealer's entire operation (R. 206).

Raymond S. Shannon, of Weyenberg Shoe Manufacturing Company, testified that his company could not sell Brown franchise stores and had lost accounts due to the Brown franchise plan (R. 217-8, 223-4); but that this testimony and such knowledge as he had of the program was obtained from contact with salesmen and with other merchants (R. 217). Actually, the uncontradicted evidence shows that Weyenberg was selling 34 (Resp. Exs. 11-13; R. 564, 888-899, l. c. 894) out of 573, or slightly less than 6% of Brown franchise stores, as compared with 4500 out of the total retail outlets of 70,000, or slightly in excess of 6% (R. 216, 97).

George E. Friedley of Leverenz Shoe Company, testified that his company's prospects for selling shoes to Brown

franchise dealers were poor except for a particular specialty shoe which Brown might not manufacture (R. 239). He produced the sales records of three shoe stores that were customers of Leverenz (Com. Exs. 152, 153, 156, R. 235-6, 238), purporting to show losses of sales to Brown franchise stores. But, in the first of these, the Winona Bootery of Winona, Minnesota, there was a change in ownership which occurred before the new owner went on the Brown franchise plan (R. 244); the case of the Meyers Shoe Store, of Watertown, Wisconsin, has been discussed above; and the third store, Emerling Shoe Store of Hamburg, New York, ceased being a substantial customer of Leverenz in 1954 (Com. Ex. 156; R. 238, 848), but didn't become a Brown franchise store until March, 1956 (Com. Ex. 141-M; R. 214, 828).

As against this most inconclusive testimony of the six manufacturers' witnesses produced by the Commission, the Record evidence is replete with testimony of thirty-odd Brown franchise dealers as to exactly why they did not carry the lines of shoes manufactured and sold by Juvenile, Deb, Freeman, Weyenberg, Huth-James and Leverenz, and the Hearing Examiner refused to receive the testimony of additional dealers (R. 523-5). Many testified they were sold on the lines of the shoes they were carrying, and for that reason did not wish to substitute or add another line of shoes (e. g., R. 338, 465, 504). Others testified it was because the line in question did not fit into their particular shoe retailing picture (R. 408, 458). Time and time again, franchise dealers testified that they had never been called upon by salesmen representing these companies. For example, Juvenile (R. 365-6, 519); Deb (R. 420-1, 504, 519); Weyenberg (R. 290, 421, 485, 500); Freeman (R. 333, 349, 485). Another cause of the failure of these competing companies to sell Brown franchise stores was the fact that in numerous instances such companies already had other shoe outlets in town carrying and

selling their lines, and were not interested in selling to other outlets there (R. 328, 360-1, 464-5, 477). The converse of this is equally true. Dealers in small or medium size towns are influenced, to a considerable extent, in refusing to consider other lines of shoes by reason of the fact that such lines are already being sold by another shoe retail outlet in their town (R. 346, 372-3, 493-4).

The record shows that the primary reason Huth-James and Leverenz were selling to so few franchise dealers is because they are regional companies whose shoes are not advertised or sold nationally and are not as well known as the lines of other manufacturers of men's shoes. A number of franchise dealers testified they were not acquainted with these two lines (See, for example, (R. 275, 334, 338, 343, 347, 349, 353, 361, 410, 429, 452-3, 485, 520, 534)). The majority of franchise dealer witnesses had never been called upon by a salesman from either company (R. 257, 290, 328, 334, 349, 373, 382, 387, 401, 410, 421, 465, 471, 477, 485, 494, 500, 505, 516, 520, 534, and preceding citations).

In considering whether Huth-James or Leverenz are, in fact, foreclosed from Brown franchise stores, it should be noted that Weyenberg and Freeman, whose shoes are in direct competition with Huth-James and Leverenz men's and boys' shoes, sold to 34 and 21 Brown franchise stores respectively of the 573 stores reporting (Resp. Ex. 11-13; R. 564, 888-899, l. c. 891, 893-5). If the Brown franchise stores are not foreclosed to Weyenberg or Freeman shoes, there is certainly no reason to believe they were prevented from buying Huth-James or Leverenz shoes. Thus, the total of reporting Brown franchise stores, buying one of these four men's shoe lines, which compete with Brown's branded men's lines, was 61 stores.

By the same token, many other brands listed by the six manufacturer witnesses as competitive with their lines are found among the lines reported by the franchise deal-

ers. Thus these dealers can and do carry shoes of these competing lines, it seems, as well as the brands of the six competitors who testified.

2. **The Commission's Decision.**

We have had some difficulty in understanding the precise rationale of the Commission's decision. In its Complaint, in Count I, the Commission charged (R. 3, 4), in substance, that the agreements, written and oral, between Brown and the operators of the Brown Franchise Stores, were exclusive dealing agreements, such as are prohibited by Section 3 of the Clayton Act, and for that reason constituted unfair methods of competition under Section 5 of the Federal Trade Commission Act. The case was tried before the Hearing Examiner upon that theory.

In his opening statement Counsel Supporting the Complaint stated, with respect to Count I, inter alia,

> "Brown has entered into a contract which requires this group of customers to deal exclusively with them to the exclusion of all other competitors producing and attempting to sell similar types of shoes"* (R. 85).

Counsel Supporting the Complaint also stated that, after an operator had been dropped from the program

> "* * * the Brown Company does not then refuse to sell the franchisee shoes. They will continue to sell him shoes, but they deny him certain services which he was granted on the condition that he deal exclusively" (R. 85).

Again Counsel Supporting the Complaint stated

> "The effect of this contract and Brown operations under this contract is to foreclose and exclude competitors from a substantial segment of the shoe market * * * that Brown does enforce these exclusive-dealing

contracts with approximately 700 of its customers. Without more this is a violation of the Federal Trade Commission Act, section 5" (R. 86).

The taking of testimony commenced on March 16, 1960 (R. 88), and was not completed until October 30, 1961 (R. 547), at which time the Hearing Examiner was still under the impression that the charge in Count II of the Complaint was under Section 5 of the Federal Trade Commission Act, but that the charge in Count I was a charge of exclusive dealing under Section 3 of the Clayton Act. Thus, when counsel for the Company said

> "Well, I believe that inasmuch as this is a Section 5 proceeding and we are charged with some type of unfair trade practice——"

the Hearing Examiner said

> "Well, a Section 5 charge is the resale price maintenance. The other charge is under Section 3, isn't it?" (R. 547).

The Hearing Examiner found in Paragraphs 41 and 42 (R. 28), in considering the substantiality of the effect of the plan, that

> "The substantiality of the effect is distorted by attempting to compare the market share sold through the franchise plan to the total United States market. It appears that each trading area where a Brown Franchise Plan account is located would be the appropriate geographical market in which to appraise the effects of the restrictive provision because the retail shoe market is not a national market except to the slight extent that shoes are bought by mail",

and concluded that

> "Since there are about 600 such trading areas, in most of which the effect of the restrictive provision

> is substantial, it is concluded that the total effect on competition is substantial."

The Examiner then made his decision, on Count I, according to the standard of illegality of Section 3, saying (R. 30):

> "It is found and concluded that the effect of the methods, acts, and practices of the respondent, as hereinbefore found, has been, is, or may be, substantially to lessen, hinder, restrain, and suppress competition in the purchase and sale of shoes in interstate commerce; * * *."

The Commission, very properly, struck from the Examiner's decision his erroneous findings in Paragraphs 41 and 42 in their entirety, but substituted therefor its own findings which, we submit, are equally erroneous (R. 46) (The reference in the Footnote on page 46 of the Record should be to Record Pages 68 and 74 instead of 73 and 79).

The opinion of the Commission, after discussing in some detail the Brown franchise plan and its operation, but without any discussion or consideration of the question as to whether or not the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce, substituted for the Examiner's findings its own findings above referred to, in part, as follows (R. 68):

> "In short, from our review of the record, we find that respondent's operation of the franchise plan, which has effectively foreclosed its competitors from selling to a significant number of retail shoe stores, constitutes an unfair trade practice under Section 5 of the Federal Trade Commission Act."

In other words, the Commission apparently concluded that the alleged foreclosure of competitors from selling to a significant number of retail shoe stores was alone a sufficient finding with respect to the substantial effect upon

competition. Then, as if to explain or justify this conclusion, the Commission continued (R. 68):

> "Respondent's practice of conditioning the benefits of membership in the plan to adherence to the restrictive terms of the franchise agreement for the purpose of foreclosing other manufacturers from selling to its franchisees is akin to the operation of tying clauses generally held as inherently anticompetitive."

The Commission next referred to Brown's contention that the legality or illegality of the plan could only be determined after an examination of the competitive impact of the plan, and rejected Brown's contention, on the sole authority of its own decision in the case of *Luria Brothers and Company, Inc., et al.,* Commission Docket 6156 (1962), which, incidentally, is a Section 1 case involving an alleged attempt to monopolize, and is now pending on appeal in the Third Circuit Court of Appeals. Then, having rejected Brown's contention, the Commission said (R. 69):

> "If respondent's argument were material to the issue presented by Count I of this complaint, it should be weighed in the light of the holding of the Supreme Court in *Brown Shoe Co., Inc. v. United States,* * * * [wherein the Court ruled] the percentage of the market foreclosed by the vertical arrangement cannot itself be decisive and that it was, therefore, necessary to examine the various economic and historical factors in the relevant market to make the determination of whether the supplier-customer relationship is the type of arrangement which Congress sought to proscribe."

But without making any such examination, the Commission continued with the bare statement (R. 69):

> "Factually there is a close parallel between this proceeding and the merger action involving Brown's acquisition of the G. R. Kinney Company."

The Commission then said (R. 70):

> "We have found that Brown's operation of the franchise plan constitutes an unfair trade practice violative of Section 5 of the Federal Trade Commission Act. We conclude, therefore, that Count I of the complaint has been sustained."

followed by the statement:

> "Moreover, an examination of the market facts of the shoe industry, as developed in this record in the light of the *Brown Shoe* decision, persuades us that the prospective competitive impact of the franchise program is such that the standards of illegality under Section 3 and Section 7 of the Clayton Act, as amended, have been met."

Thus it seems to be clear that the Commission found that the franchise plan violated Section 5 of the Federal Trade Commission Act simply because it was akin to the operation of tying clauses generally held to be inherently anti-competitive.

But the meaning of its reference, without any discussion or explanation, to its "examination of the market facts of the shoe industry, as developed in this record in the light of the *Brown Shoe* decision", and its persuasion that the standards of illegality under Section 3 and Section 7 of the Clayton Act have also been met, is not clear. Does the Commission merely mean that it finds that a not insubstantial amount of commerce is affected and therefore the standards of illegality under Section 3 for a tie-in arrangement have been met, or does it mean that from its examination of the market facts it has concluded that the effect may be to substantially lessen competition in the shoe industry? If the latter, then the Commission "has not set forth the basis for its broad orders with sufficient clarity and completeness so that they can be properly reviewed", as suggested by Mr. Justice Goldberg in his dissenting

opinion in *Atlantic Rfg. Co. v. Federal Trade Commission,* 381 U. S. 357, l. c. 382. Then, the Commission, having first held that the standards of illegality under Section 3 did not have to be met in order to constitute a violation of Section 5, and having next, without stating how or why, said that the standards of illegality under Section 3 had been met, proceeded, in order to determine the nature and scope of the remedy to be applied, to (R. 70) "turn now to a consideration of the market facts of the shoe industry for that purpose."

The Opinion of the Commission was written by Chairman Dixon, and concurred in by Commissioner MacIntyre. Commissioners Anderson and Higgenbotham did not participate. Commissioner Elman "considering that the exclusive vertical arrangements shown by the record have the requisite competitive effects, *Brown Shoe Co. v. United States,* 370 U. S. 294, 323-324 (1962), concurs in the Commission's decision and order" (R. 83-4).

3. **The Court of Appeals' Decision.**

The scope and effect of the Court of Appeals' decision will be discussed more fully below in the course of the Argument.

SUMMARY OF ARGUMENT.

The Brown franchise plan is not an exclusive dealing arrangement. It is merely a plan whereby Brown gives to the dealers on the plan certain services and benefits, in addition to those given to all dealers, so long as the dealers concentrate their business on Brown lines of shoes to the extent, on the average, of approximately 75% of their total requirements. Formerly Brown and the dealers signed a written franchise agreement, but this practice was terminated a number of years ago, and at least two-thirds of the dealers presently on the plan have signed no agreement.

The Commission charged in its complaint and attempted to prove that the plan is an exclusive dealing arrangement, and that the effect may be to substantially lessen competition. The Hearing Examiner recognized that if the market affected by the plan were compared with the national market the effect could not be said to substantially lessen competition. Instead he found that the substantiality of the effect of the plan should be measured by a comparison only with the retail shoe market in the trading areas where Brown franchise stores are located and on the basis of such comparison held that the effect was substantial (R. 28). The Commission properly struck from the Examiner's decision his findings with respect to the substantiality of the effect of the plan (R. 46). But it substituted its own equally erroneous one that it was not necessary to examine into the effect of the plan on competition because it is "akin to the operation of tying clauses generally held to be inherently anti-competitive" (R. 68-9), and, accordingly, unlawful under Section 5 of the Act. The Commission added, without discussion or explanation or any indication as to what standards of illegality were referred to, that "the prospective competitive

impact of the franchise program is such that the standards of illegality under Section 3 * * * have been met'' (R. 70).

The Court of Appeals reversed. At the outset the Court stated "Our primary question is whether there was adequate evidentiary basis for the Commission's finding that the Brown franchise program was an unfair method of competition and accordingly unlawful under § 5 of the Act'' (R. 582-3). The Court determined that the plan met the test of *Federal Trade Commission v. Gratz*, 253 U. S. 421; that the plan could not be likened to a tying arrangement; that the decision of this Court in *Brown Shoe Co. Inc. v. United States*, 370 U. S. 294 was not controlling, and concluded "We hold that the Brown franchise stores program was not an unlawful tying arrangement and that there was a complete failure to prove an exclusive dealing agreement which might be held violative of § 5 of the Act'' (R. 591).

While Section 5 of the Federal Trade Commission Act is a broad and flexible grant of authority, it does not authorize the Commission to prohibit methods of competition or practices which are not "deceptive'' or "unfair''. An exclusive dealing arrangement is not an unfair method of competition unless (a) the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce,'' or (b) it is the kind of an arrangement which is inherently anti-competitive.

Under the Brown franchise plan there is no sale of any shoes "on the condition * * * that the * * * purchaser thereof shall not use or deal in the goods * * * of a competitor of the * * * seller.'' Shoes are sold to the dealers on the plan and the dealers who are not on the plan at the same prices and upon the same terms, and only on the condition that they be paid for in due course. Brown gives to the dealers on the plan certain extra benefits and services so long as they concentrate their business to the

extent, on the average, of 75% of their requirements, on Brown lines. But the dealers may, and sometimes do, withdraw from the plan at will and without notice and continue to purchase Brown shoes, to the extent they elect to do so, at the same prices and upon the same terms. Brown, however, must give at least thirty days' notice of its intention to withdraw the benefits of the plan from a dealer.

Since competitors of Brown are selling their shoes to five out of six of the dealers on the plan (Resp. Exs. 11-13; R. 564, 888-899, l. c. 890), and other manufacturers are selling, on the average, 25% of each dealer's requirements, the plan does not "foreclose" competitors of Brown from the share of the market represented by the dealers on the plan. Since the dealers are free to leave the plan at any time, such "foreclosure", if any, is but a temporary one.

The dealers who elect to go on the Brown franchise plan do so primarily because they are "sold" on Brown lines and believe that they can handle them at a profit (R. 293, 349, 352, 376, 384, 420, 424, 427, 454, 483, 489, 507). The services which Brown gives to the dealers who concentrate on Brown lines are needed by the dealers according to the Commission's own witness (R. 206, 211), and consist of merchandising advice and assistance which helps the small independent dealers to compete with the large chains. They are beneficial to the dealers in the plan because their rate of return on their investments average 16% compared with a rate of return of only 11.8% for all independent shoe dealers (R. 26). The reason why dealers on the plan voluntarily elect, in most instances, to remain on the plan and concentrate on Brown lines rather than on lines of Brown's competitors is that they find it good business to do so, and not because they are "foreclosed" from concentrating on lines of Brown's competitors.

The Brown franchise plan is not a tying arrangement nor akin to a tying arrangement. Under the plan Brown sells nothing but shoes. There is no sale of the services Brown gives to the dealers on the plan. Brown has no control or dominance over the services it renders, and hence has no power or leverage to force the purchase of its lines. There is no "economic leverage" in Brown's hands; there are no "direct and overt threats of reprisal"; no "utilization of economic power in one market to curtail competition in another"; and hence it cannot be said that "the effect of this plan is similar to that of a tie-in" as in *Atlantic Refining Co. v. F. T. C.*, 381 U. S. 357, 368-369, 371.

Even if the Brown franchise plan were literally an exclusive dealing or requirements arrangement, the effect of the plan would not be to substantially lessen competition because Brown's sales under the plan are less than 1% of all shoes sold in the United States (R. 28), and the dealers are free to withdraw from the plan at will. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U. S. 320.

What the Commission seeks to do in this case under the authority of Section 5 of the Act is to prohibit a method of competition as being "unfair" which contains no element of deception, is not opposed to good morals, bad faith, fraud or oppression, is not inherently anti-competitive, is not a sale of goods on condition that the purchaser will not deal in the goods of a competitor, and without a showing that the effect of the plan, however it may be characterized, may be to substantially lessen competition or tend to create a monopoly in any line of commerce. Section 5, broad and flexible as it may be, grants no such authority to the Commission.

ARGUMENT.

I. The Brown Franchise Plan Does Not Involve a Market Foreclosure of the Type Proscribed by Section 3 of the Clayton Act, or of Any Type Other Than That Naturally Flowing From a Satisfied Customer's Reluctance to Shift to a Different Source of Supply.

A. The Court of Appeals did not fail to recognize the scope of the Commission's authority under Section 5 to forestall practices resulting in competitive effects proscribed by Section 3. Instead, the Court of Appeals gave explicit recognition to the Commission's authority but found that there was no evidentiary basis for the Commission's finding as to the anti-competitive effects of the plan.

The Commission contends (Com. Br. pp. 15-16) that the Court of Appeals held that the Commission could not condemn the Brown franchise plan as an unfair method of competition under Section 5 solely because it meets the test of *Federal Trade Commission v. Gratz*, 253 U. S. 421, and that "the decision reflects an erroneously narrow reading of the reach of Section 5." We submit that the Commission's brief reflects an unreasonably narrow reading of the decision of the Court of Appeals.

The Court of Appeals was primarily concerned with the lack of evidentiary support for the Commission's finding and decision, rather than, as the Commission contends, with limiting the scope of the Commission's authority under Section 5 to forestall practices resulting in the competitive effects proscribed by Section 3 when there is adequate evidence of the probability of such competitive effects.

It was because the Court of Appeals determined that the Commission's finding "that the Brown franchise pro-

gram was an unfair method of competition and accordingly unlawful under § 5 of the Act'' was *without adequate evidentiary basis* (emphasis added) that the Court of Appeals reversed, and not because it was undertaking to restrict the power of the Commission under Section 5 of the Act to deal with anti-competitive practices. Nor does the decision restrict or limit the power of the Commission beyond holding that the Commission's findings of fact must have an adequate evidentiary basis.

Examining the opinion of the Court of Appeals we see that it noted (R. 581-2):

> ''When this case was first instituted on October 13, 1959, it obviously was the theory of the Federal Trade Commission that Brown's franchise stores program was an unlawful exclusive dealing arrangement violative of § 5 of the Act. It was so found by the Hearing Examiner and decided by him on that basis.''

The Court of Appeals then pointed out that the Commission refused to go along with the Hearing Examiner, saying (R. 582):

> ''The Commission struck such findings of the Examiner, stating:
>
> > '' 'In short, from our review of the record, we find that respondent's operation of the franchise plan, which has effectively foreclosed its competitors from selling to a significant number of retail shoe stores, constitutes an unfair trade practice under Section 5 of the Federal Trade Commission Act. Respondent's practice of conditioning the benefits of membership in the plan to adherence to the restrictive terms of the franchise agreement for the purpose of foreclosing other manufacturers from selling to its franchisees is akin to the operation of tying clauses generally held as inherently anti-competitive.' ''

Apparently the Commission found this kinship in the fact that the evidence showed that the relationship between Brown and the operators of the franchise stores was a "reasonably stable one," and because of such stability, rather than because of any unfairness or illegality, competitors were effectively foreclosed (R. 63).

Having reviewed, at some length, the pleadings, the evidence, the Examiner's decision, and the Commission's findings, the Court of Appeals indicated its recognition of the purpose of the Act by citing this Court's decision in the case of *Federal Trade Commission v. Raladam Co.,* 283 U. S. 643, 647, wherein it was said "The object of the Trade Commission act was to stop in their incipiency those methods of competition which fall within the meaning of the word 'unfair'."

The Court of Appeals next expressly stated that the primary question with which it was concerned was merely the adequacy of the evidence to support the Commission's findings, saying (R. 582-3):

> "Our primary question is whether there was adequate evidentiary basis for the Commission's finding that the Brown franchise program was an unfair method of competition and accordingly unlawful under § 5 of the Act."

Then, before undertaking to examine the evidence, the Court of Appeals, further emphasizing its opinion that its primary concern was with the adequacy of such evidence, pointed out that the Act itself provides, 15 U. S. C. A., § 45 (c), that the findings of the Commission as to the facts, if supported by evidence, shall be conclusive; and quoted (R. 583) from the opinion of this Court in the case of *Universal Camera Corp. v. N. L. R. B.,* 340 U. S. 474, 488, where it was held that a reviewing Court may set aside a Board decision,

> "when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."

Having thus defined the question with which it was concerned as being one with respect to the adequacy of the evidence, and having indicated its recognition of the limitations of a reviewing Court in passing upon the adequacy or substantiality of the evidence, the Court of Appeals proceeded to review such evidence.

In the course of such review the Court of Appeals pointed out that historically the validity of programs such as the Brown franchise program, which it had been carrying on for at least thirty years had never been challenged and that the Brown program met the test of *Gratz* (R. 584-5). But the Court of Appeals did not, as the Commission's brief seems to contend, stop there and reverse solely because the test of *Gratz* had been met. Instead, the Court of Appeals then took up the Commission's conclusion that the Brown franchise plan is akin to a tying arrangement, analyzed and distinguished the decisions cited by the Commission to support its position, and went on to examine the evidence and to point out the complete absence of any market foreclosure of Brown's competitors other than that resulting from the fact that the operators of the Brown Franchise Stores, though free to leave the program at any time, voluntarily remain on the program because it helps to make them successful and profitable operators (R. 585-9). Thus the Court of Appeals said (R. 586):

> "Retailers were free to abandon the arrangement at any time they saw it to their advantage so to do."

(R. 588):

> "In Brown there was no 'sale' of the tying product (franchise services); there is no evidence that Brown's

'power or leverage' in the tying product was such as to force the purchase of the 'tied products' (shoes). This case presents a situation where the seller, Brown, has no control or dominance over the tying product, services; consequently, the Brown franchise program is not an 'effectual weapon' to pressure buyers into taking the tied item, shoes."

(R. 589):

"Brown's franchise program was not the only program available to retailers. It did not give Brown the economic leverage to force the sale of its shoes. * * * There is nothing specialized or unique about the services offered by Brown."

(R. 589):

"Brown has not 'acquired' the retail outlets of those who join its program. The latter are free to leave it at any time."

Having completed its review of the evidence and found it lacking, the Court of Appeals concluded (R. 591):

"We hold that the Brown franchise program was not an unlawful tying arrangement and that there was a complete failure to prove an exclusive dealing agreement which might be held violative of § 5 of the Act."

Thus we submit the decision of the Court of Appeals does not reflect an erroneously narrow reading of the reach of Section 5 and is not in conflict with the decisions of this Court cited in the Commission's brief, including the recent decision in the case of *Atlantic Rfg. Co. v. Federal Trade Commission*, 381 U. S. 357.

As the Court of Appeals pointed out (R. 588), there is here no tying arrangement, nor anything "akin" to, or having the "characteristics" of, a tying arrangement, nor does the plan produce effects similar to a tying ar-

rangement. We have here no "overt acts of coercion", no "direct and overt threats of reprisal", and no "utilization of economic power in one market to curtail competition in another", as in *Atlantic Rfg. Co., supra.*

We do not question the Commission's contention (Com. Br. 16) that Section 5 of the Federal Trade Commission Act is a broad and flexible provision, nor the recent statement by this Court in *Atlantic Refining Co.,* supra, l. c. 367:

> "In a broad delegation of power it empowers the Commission, in the first instance, to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term 'unfair' to the Commission rather than attempting to define 'the many and variable unfair practices which prevail in commerce. . . .' S. Rep. No. 592, 63d Cong., 2d Sess., 13. As the conference report stated, unfair competition could best be prevented 'through the action of an administrative body of practical men . . . who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations.' H. R. Conf. Rep. 1142, 63d Cong., 2d Sess., 19. In thus divining that there is no limit to business ingenuity and legal gymnastics the Congress displayed much foresight. See *Federal Trade Comm'n v. Cement Institute,* 333 U. S. 683, 693 (1948)."

But Congress has not proscribed nor has this Court yet condemned mere "business ingenuity" or even "legal gymnastics". It is only "unfair" methods of competition, or "unfair or deceptive" acts or practices in commerce which are declared unlawful by Section 5 of the Federal Trade Commission Act, and even though the Commission is given the authority in the first instance to determine

whether a method of competition is unfair or acts or practices are unfair or deceptive, it is for the Courts, and this Court in particular, in the last analysis, to determine whether the methods, acts or practices condemned by the Commission as being unfair or deceptive are, as a matter of law, unfair or deceptive within the meaning of the Act. *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U. S. 304; *Federal Trade Commission v. Raladam Co.*, 283 U. S. 643.

Thus, this Court has held that Section 5 of the Act applies to (a) deceptive practices such as the use of deceptive statements in advertising—*Federal Trade Commission v. Raladam Co., supra; Federal Trade Commission v. Raladam Co.*, 316 U. S. 149; *Federal Trade Commission v. Mary Carter Paint Co.*, 382 U. S. 46; deceptive television advertising—*Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U. S. 374; a misleading use of the words "Red Cross"—*Federal Trade Commission v. A. P. W. Paper Co., Inc.*, 328 U. S. 193, 199; (b) violations of the Sherman and Clayton Acts—*Federal Trade Commission v. Cement Institute*, 333 U. S. 683; *Federal Trade Commission v. Motion Picture Adv. Serv. Co.*, 344 U. S. 392; *Fashion Originators' Guild v. Federal Trade Commission*, 312 U. S. 457, an arrangement which, although not technically a tying arrangement within the prohibition of Section 3, had an effect similar to that of a tie-in. *Atlantic Rfg. Co., supra;* and (c) methods of doing business opposed to good morals such as a lottery or gambling device which encourages gambling among children—*Federal Trade Commission v. Keppel & Bro., supra; Federal Trade Commission v. Gratz, supra.*

On the other hand, neither this Court nor, to the best of our knowledge, any Court has held that methods and acts which are not "unfair" or "deceptive" within the broad meaning of those terms as used in the cases such

as those cited above are within the coverage of Section 5 of the Act.

In the present case we have nothing comparable to any methods ever held by this or any other Court to be "unfair". It is not suggested that there are any "deceptive" practices. The only thing about the Brown franchise plan that is criticized or sought to be condemned is Brown's practice of granting the benefits of the plan only so long as the dealers elect to concentrate their business on Brown lines and purchase, on the average, approximately 75% of their requirements from Brown. But they are absolutely free to leave the plan whenever they see fit to do so, whether because a salesman for a competing manufacturer persuades them that they can do better concentrating upon such other manufacturer's shoes or because they come to that independent conclusion without such sales efforts. As the Court of Appeals has expressly held (R. 588), Brown has no "power or leverage", "no control or dominance" over the benefits and services which it was granting under the plan. There is nothing unique about them which could not be furnished by any other manufacturer if it elected so to do. They are highly beneficial to the dealers on the plan, and because they are beneficial, tends to make them "loyal" customers of Brown. It is apparently this loyalty that the Commission complains of, as indicated by its finding, in answer to Brown's contention that dealers are free to leave the plan at any time, that "the relationship between Brown and its franchisees is a reasonably stable one" (R. 63). But the fact that Brown's relationship with its customers on the franchise plan is a reasonably stable one, does not make the plan "unfair".

The Commission says (Com. Br. p. 17) that the Court of Appeals did not disturb the Commission's findings as to the anti-competitive effect of Brown's franchise plan. It appears that the Commission has misread the Court of

Appeals' decision. What the Court of Appeals did do was to hold that there was a lack of evidentiary support for the Commission's finding as to any anti-competitive effects of the plan—that there was a complete absence of proof of any market foreclosure of Brown's competitors other than that resulting from the fact that the dealers operating under the plan, though free to leave the program at any time, voluntarily elect to remain on the program because they believe it is profitable and good business to do so.

B. Brown's franchise plan is not an exclusionary arrangement of the type proscribed by Section 3. Instead, it is, in substance, merely an arrangement whereby certain additional benefits are given to the dealer so long as he concentrates on Brown lines.

The Brown franchise plan arrangement does not constitute "an exclusionary arrangement of the type proscribed by Section 3," nor, in essence, is it an exclusionary arrangement of any type. There is no "sale or contract for sale" of shoes "on the condition, agreement or understanding" that the purchaser "shall not use or deal in" the shoes "of a competitor or competitors" of Brown. Shoes are sold by Brown under the plan at the same prices and upon the same terms and conditions that they are sold to all independent retail dealer customers of Brown, the only condition being that they be paid for in due course. It is merely an arrangement whereby so long as the dealer concentrates his business within the grades and price lines of Brown shoes, i. e., carries an adequate and representative stock of such shoes and handles them in a representative manner, Brown will give him certain additional services and benefits, some of which are not available to customers of Brown who do not so concentrate their business. It is not an exclusive dealing arrangement or requirements contract, but, at the most, an arrangement

for concentration of an unspecified portion of the dealer's business within Brown lines so long and only so long as the dealer elects to do so.

(a) **Exclusive dealing and requirements contracts are the same in legal effect.**

An exclusive dealing contract and a "requirements" contract are, in legal effect, the same. In the case of *Standard Oil Co. v. U. S.*, 337 U. S. 293, the contracts involved were "requirement contracts" which contained no express condition that the purchaser should not use or deal in the goods of a competitor, but they were held to violate Section 3 of the Clayton Act, and, as pointed out by the Court of Appeals in the case of *Tampa Electric Company v. Nashville Coal Company*, 276 F. 2d 766, 777, a "requirements contract" does not expressly contain the "condition, agreement, or understanding" that the purchaser will not use or deal in the goods of a competitor, but the actual result of a total requirements contract is to prevent the purchaser from using or dealing in the goods of a competitor irrespective of the absence of the specific words contained in the statutes.

(b) **Exclusive dealing and requirements contracts are not inherently anticompetitive nor unlawful per se.**

While the Brown franchise plan is not an exclusive dealing or requirements contract, but only an arrangement for benefits to be given so long as the dealer concentrates on Brown lines, it would not be inherently anticompetitive or unlawful per se or within the proscription of Section 3 even if it were.

This was pointed out in *Tampa Electric Co. v. Nashville Coal Co.*, 365 U. S. 320, where it was said l. c. 333:

> "It may well be that in the context of antitrust legislation *protracted* requirements contracts are suspect,

but they have not been declared illegal *per se*. (Emphasis added.) Even though a single contract between single traders may fall within the initial broad proscription of the section, it must also suffer the qualifying disability, tendency to work a substantial—not remote—lessening of competition in the relevant competitive market."

Again this Court said in *Brown Shoe Co.*, supra, with respect to vertical arrangements, l. c. 329-331:

> "A most important such factor to examine is the very nature and purpose of the arrangement. * * * Thus, for example, if a particular vertical arrangement, considered under § 3, appears to be a *limited term* exclusive-dealing contract, the market foreclosure must generally be significantly greater than if the arrangement is a tying contract before the arrangement will be held to have violated the Act. * * * Of course, the fact that *requirement contracts are not inherently anticompetitive* will not save a particular agreement if, in fact, it is likely 'substantially to lessen competition, or to tend to create a monopoly.'" (Emphasis added.)

(c) **A manufacturer has the right to select dealers who will concentrate on his products if there are no prohibited anticompetitive effects.**

As said by the Court in the case of *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F. 2d 1, 7 (1963):

> "We know of no case that holds that contracts between a manufacturer and distributors of his product whereby the latter agree to act as exclusive distributors, that is, to handle his product alone, are illegal *per se*. Most of the cases that have considered the question hold or say that such a contract is not, without more, illegal either under the Sherman Act or the

Clayton Act. (See Ace Beer Distrib., Inc. v. Kohn, Inc., 6 Cir., 1963, 318 F. 2d 283, 286-287 (Sherman and Clayton Acts); Timken Roller Bearing Co. v. F. T. C., 6 Cir., 1962, 299 F. 2d 839 (Clayton Act); Packard Motor Car Co. v. Webster Motor Car Co., 1957, 100 U. S. App. D. C. 161, 243 F. 2d 418, 420 (Sherman Act); Schwing Motor Co. v. Hudson Sales Corp., 4 Cir., 1956, 239 F. 2d 176 (Sherman and Clayton Acts); Leo J. Meyberg Co. v. Eureka Williams Corp., 9 Cir., 1954, 215 F. 2d 100 (Clayton Act); Nelson Radio & Supply Co. v. Motorola, Inc., supra, 200 F. 2d at 914 (Sherman and Clayton Acts; no conspiracy shown). Compare McElhenney Co. v. Western Auto Supply Co., 4 Cir., 1959, 269 F. 2d 332, 337-338 (Sherman and Clayton Acts))."

Such an agreement between a manufacturer and his dealers becomes illegal only if the effect would be "to substantially lessen competition or tend to create a monopoly in any line of commerce."

It has long been and, we submit, still is the law that a manufacturer has the right to select those dealers who will not only purchase and carry, if not an exclusive, at least an adequate and representative stock of the manufacturer's merchandise, but will also, by sound merchandising, through local advertising, effective selling, and otherwise, sell and continue to sell at least a reasonable quantity of such products. This principle has been most recently and clearly enunciated in the case of *Timken Roller Bearing Company v. F. T. C.*, 299 F. 2d 839 (1962), cert. den. 371 U. S. 861, l. c. 842:

"Perhaps the rule has best been stated for our purposes in the following language:

'The anti-trust laws do not prohibit a manufacturer or distributor from selecting dealers who will devote their time and energies to selling the former's prod-

ucts and a manufacturer is not compelled to retain dealers having divided loyalties adverse to the interests of the said manufacturer or distributor.' McElhenny Co., Inc. v. Western Auto Supply Co., 167 F. Supp. 949, at page 954, affirmed 269 F. 2d 332 (C. A. 4).

"A seller has the right to select his own customers. This right is protected by the Clayton Act, itself. 15 U. S. C. A., § 13. The right has been recognized by the authorities, even where it was not expressly provided for by the statute. United States v. Colgate & Company, 250 U. S. 300, 39 S. Ct. 465, 63 L. Ed. 992; Times-Picayune Publishing Company v. United States, 345 U. S. 594, 73 S. Ct. 872, 97 L. Ed. 1277; Naifeh v. Ronson Art Metal Works, 218 F. 2d 202 (C. A. 10). To uphold the order entered by the Commission in this case would be, in effect, to destroy this right. Here there has been proved no 'condition, agreement or understanding' such as has been made unlawful by the Act. Nor has there been proved any consistent policy of exclusive dealing as was alleged in the Complaint."

In the present case the evidence shows not an exclusive dealing or requirements arrangement but only an arrangement whereby additional benefits are given so long as the dealers carry adequate and representative stocks of Brown's shoes and do a reasonably good merchandising job and the evidence fails to show the claimed substantial anti-competitive effects.

(d) **The Brown franchise plan results in no actual foreclosure of competitors.**

The evidence shows, without contradiction, that everyone of Brown's competitors represented by the six witnesses produced by the Commission was actually selling

shoes to from 3 to 68 stores on the Brown franchise plan (Resp. Ex. 11-13, R. 564, 888-899, 890-4). If one manufacturer could sell to 68 stores it would appear that the Brown franchise plan, in and of itself, would not foreclose the others from doing likewise.

The evidence also showed, without contradiction, that 5 out of 6 of 573 dealers on the Brown franchise plan were carrying shoes of at least one, and, in some instances, more lines competing directly with Brown lines (Resp. Ex. 11-13; R. 564, 888-899, l. c. 890). Nor is there any dispute about the fact that, on the average, 25% of the shoes in every franchise dealer's store was purchased from one or more other manufacturers.

Thus, Brown's competitors actually had their shoes in Brown franchise stores, and salesmen were calling upon and making sales to Brown franchise dealers. Such sales may not have been in the quantities which Brown's competitors would like, just as Brown sales are not in the quantities it would like, but Brown's competitors were not "foreclosed".

(e) **Temporary foreclosure of competitors is not unlawful per se and Brown's franchise plan, at the most, results in only temporary and limited foreclosure.**

This Court has pointed out in *Brown Shoe Co. v. United States,* supra, at p. 324:

> "Every *extended* vertical arrangement by its very nature, *for at least a time,* denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement. However, the Clayton Act does not render unlawful all such vertical arrangements, but forbids only those whose effect 'may be substantially to lessen competition, or to tend to create a monopoly'

'in any line of commerce in any section of the country' ". (Emphasis added).

In this section of the Commission's brief, and, for that matter, throughout the Commission's brief, the Commission overlooks, or seeks to ignore, the fact that the arrangement between Brown and the dealers on the Brown franchise program is terminable at will—that it is merely an arrangement whereby certain additional benefits are given to the dealer so long as he elects to concentrate his purchases on Brown lines.

Any purchase by any dealer from any manufacturer, whether it be of a single pair of shoes, a dozen pairs, a complete line, 75% of his requirements, 100% of his requirements, at any one time, preempts, pro tanto, so much of the market and forecloses any other manufacturer from selling that particular dealer a comparable pair or number of pairs of or line or lines of shoes. Every time a dealer purchases, whether from one or a half a dozen manufacturers, his inventory of shoes for the Spring or the Fall season, as the case may be, so much of the market has been preempted and all other manufacturers are foreclosed from that particular section of the market. But such preemption and such foreclosure is temporary. When the time comes to replenish his stock on hand, the temporary preemption and foreclosure is at an end, and that portion of the market is open to every manufacturer producing shoes of the kind, grade, pattern and price handled by that dealer.

The arrangement under the Brown franchise program is not an "extended" one but of the most temporary character. When the average dealer on the plan purchases at any one time 75% of his requirements from Brown, that portion of his market is preempted and other manufacturers are foreclosed so long and only so long as the dealer elects to replace them with addi-

tional purchases from Brown. As long as he is doing well and making good money with Brown shoes, with the advice and assistance and guidance of Brown's field men, he will be a poor prospect for the salesmen representing competing manufacturers, and, as the Commission found, the relation will be a reasonably stable one. But whenever he is dissatisfied with the results he is getting from Brown shoes, or from any line of Brown shoes he may be carrying, or whenever a salesman of another manufacturer can sell him on the quality, style, price or performance of other shoes, he is not only free to buy them, but, on occasions, will do so. What the Commission's six witnesses from competing manufacturers were really complaining of is the fact that, generally speaking, the dealers on the Brown franchise program are not dissatisfied but do well with Brown shoes, feel that they are doing better than they could with competing brands, and that it is difficult for their salesmen to persuade them to the contrary. But such an arrangement is not the type and does not have the effect of an arrangement prohibited by Section 3.

(f) **The Brown franchise plan, at the most, results in limited temporary foreclosure, but not sufficient in quantity to substantially lessen competition.**

As will be pointed out more specifically below, in answer to pages 31-34 of the Commission's Brief, any foreclosure of competition by the Brown franchise plan is not only limited and temporary but amounts to less than one percent of the relevant market and hence not sufficient to substantially lessen competition.

(g) **Answers to various statements in the Commission's brief.**

The Commission seems to argue that the evil in the Brown franchise plan is that Brown will not give the

dealer the benefits of the plan unless he purchases 75% of his requirements from Brown; that Brown should give the same benefits to the dealer who purchases only 50% or 40% or even 5% of his requirements from Brown. Certainly the Brown franchise plan should not be condemned because Brown does not give all of the services given under the plan, without charge and at considerable expense, where the small volume of business done will not justify such additional expense.

The Commission says (Com. Br. p. 18) that the meaning of the Court of Appeals' finding that "there was a complete failure to prove an exclusive dealing agreement which might be held violative of § 5" is not entirely clear. We submit that the Court of Appeals' finding is entirely clear and could not be clearer. It means exactly what it says.

The Commission says (Com. Br. p. 18) that there is "no real dispute" as to the meaning of the undertaking of each franchisee to carry "no lines conflicting with Brown Division Brands of the Brown Shoe Company". Apparently there is a very real dispute as to the meaning of this language. As pointed out above, it does not obligate retailers not to purchase shoes of the types and grades manufactured by Brown from manufacturers other than Brown, but only not to carry conflicting "lines". Once a dealer undertakes to "concentrate" on Brown lines, any supplemental agreement not to carry conflicting lines is redundant. He cannot concentrate on Brown lines and not concentrate on Brown lines at the same time. The Commission treats the undertaking found in the written agreements and the policy promulgated in the plan where there are no agreements as being a contract obligation, enforceable for some specific or perhaps unlimited period of time; whereas, in fact, it is nothing more than a practice or policy followed so long and only so long as the dealer, exercising his own free and independent judg-

ment, sees fit to go along. It is true that the Commission found that in practice the agreement resulted in the preemption by Brown of 75% of the requirements of its franchise dealers. But it is also true that the Court of Appeals concluded, as it was forced to conclude on the record, that this finding of the Commission was without evidentiary support. It is not undeniable that Brown obtained exclusive dealing agreements with its retailers. On the contrary, even with those dealers who have signed written agreements it obtained nothing more than agreements to concentrate on Brown lines, to buy from Brown, on the average, 75% of the dealer's requirements, as long as the dealer sees fit to continue such purchases. Such agreements are not the type and do not have the effects of agreements proscribed by Section 3.

The Commission says (Com. Br. p. 18) that the Court of Appeals was plainly in error if "the Court of Appeals meant that the agreement which was proved was one which under no set of surrounding circumstances could be held unlawful". We submit that neither the agreement nor the policy, since it could be terminated by Brown at any time upon thirty days' notice and by the dealer at any time and without notice, could be held to be unlawful under any set of surrounding circumstances. The Commission is in error in saying (Com. Br. p. 19) that the Court of Appeals did not reject the Commission's finding that by the operation of the plan Brown had effectively foreclosed its competitors. On the contrary, the Court of Appeals did reject such finding of the Commission, although not in those precise words, when it held, after reviewing the evidence, "that there was a complete failure to prove an exclusive dealing agreement which might be held violative of § 5 of the Act." If there was a complete failure to prove an exclusive dealing agreement which might be held violative of Section 5 of the Act, there was a complete failure to prove an agreement foreclosing Brown's competitors.

We concede that the Commission's opinion was concerned, or purported to be concerned, with the impact of the Brown franchise plan on competition and not on the label it carries, and that its analysis of the facts, to the limited extent it made an analysis, was directed to what it considered to be the effect of the plan in foreclosing competition, although, as we have elsewhere pointed out, we contend, and the Court of Appeals held, there was no evidentiary support for the Commission's conclusion that the effect of the plan was to foreclose competition. Of course, we do not deny that exclusionary arrangements as such fall under Section 5 if they violate the policies of Section 3.

But we do not agree that *Atlantic Refining Company*, supra, is authority for the Commission's contention that the Brown franchise plan has consequences proscribed by Section 3 of the Clayton Act, although not precisely within the bounds of that Section, and thereby violates Section 5. We have here none of the improper practices and none of the adverse consequences found in *Atlantic Refining Company*. There have been no "direct and overt threats of reprisal", no "utilization of economic power in one market to curtail competition in another"; and no "actual threats and coercive practices"; and the effect of the Brown franchise plan is not similar or akin to that of a tie-in.

While we agree with the Commission's definition (Com. Br. p. 19) of an exclusive dealing arrangement, we disagree with the Commission's contention (Com. Br. p. 20) that the Brown franchise plan "falls clearly within the policy of Section 3," if by the language quoted the Commission means that any "exclusive dealing" arrangement or policy, or any "requirements" contract violates Section 3, regardless of the length of the term of the arrangement, policy or contract, whether or not it is terminable at will, regardless of the extent of commerce

affected, whether or not it be inherently anticompetitive, and whether or not the effect may be "to substantially lessen competition or tend to create a monopoly in any line of commerce."

We agree that those of the services and benefits furnished by Brown under the Brown franchise plan which are not furnished to all of the customers of Brown are furnished only so long as the dealer concentrates his business within the grades and price lines of Brown shoes, and we also agree that they are of value to the retailer. But there is no actual foreclosure of competition resulting from the Brown franchise plan and, at the most, none other than the temporary foreclosure discussed above, which results from any purchase by any dealer from any manufacturer.

The Commission seems to contend (Com. Br. p. 21) that the Commission in its decision found that the dealer's adherence to the plan was not purely voluntary. If the Commission did so find, then such finding was entirely without evidentiary support, because the record shows, without contradiction, that the dealers were not only free to leave the plan, but did leave the plan, whenever they saw fit to do so. The benefits of the plan were merely inducements, not compulsions, for the dealers to remain on the plan and concentrate their purchases on Brown's lines. It is true that the Commission's conclusion that the plan is an unfair method of competition under Section 5 is based squarely and solely upon Brown's practice of not continuing to give all of the benefits of the plan to dealers who elected not to concentrate on Brown lines, but, as pointed out above and below, this was not sufficient to make the practice an "unfair" method of competition under Section 5.

As we have indicated above, and will point out more specifically below with respect to the absence of any sub-

stantial adverse effect upon competition, even if the written agreements and Brown's policy under the plan called for each dealer to purchase 100% of his requirements from Brown, the agreements and the plan would not meet the standards of illegality under Section 3, and would not constitute an unfair method of competition under Section 5 of the Federal Trade Commission Act.

II. Regardless of the History and Structure of the Shoe Industry There Is No "Foreclosure" Effected by Brown's Franchise Program Other Than the Foreclosure Which Results So Long and Only So Long as Brown's Customers Are Satisfied, for Which There Is Ample Economic Justification. Accordingly, the Commission Was Not Justified in Finding That the Program Violated the Policy of Section 3 of the Clayton Act.

We have shown above that neither the written agreement, nor the practice and policy of Brown under the Brown franchise program where there is no written agreement, is the type of vertical arrangement to which Congress addressed itself in Section 3 of the Clayton Act. It is true, as pointed out above, that the Commission, without an examination of the market facts of the shoe industry, and without consideration of the standards of illegality other than a statement that such standards were not applicable, and after stating that there was no necessity for any such finding, found that the prospective competitive impact of the franchise program is such that the standards of illegality under Section 3 have been met. We agree that the question before the Court of Appeals and now before this Court is whether that finding has warrant in the record and a reasonable basis in law, and submit that, as the Court of Appeals expressly found, it has not.

We agree that the decision of this Court in *Brown Shoe Co. v. United States*, supra, held that the industry had experienced a history of progressive concentration and foreclosure of competing manufacturers by the ownership of retail outlets, and that this Court held that Brown was a leading force in such history. But we deny that no economic justification could be shown by Brown for the requirement that dealers concentrate, on the average, 75% of their business in Brown lines if they are to receive the extra benefits and services under the plan; we deny that the Brown franchise plan was a major factor or any factor in foreclosing markets to competitors, and contend that an examination of the factors cited by the Commission (Com. Br. 22) will demonstrate that the provisions of the plan are not repugnant to the standards of the Clayton Act, and, accordingly, may not be held to be unlawful under Section 5 of the Federal Trade Commission Act.

A. Any trend toward concentration and vertical integration in the shoe industry is irrelevant.

The Commission contends (Com. Br. pp. 22-27) at some length that there has been a trend toward concentration and vertical integration in the shoe industry, basing its contention primarily upon the findings of this Court in *Brown Shoe Co.*, supra. We will not, of course, undertake to challenge or refute such findings except to point out (a) that this Court was not then concerned with the legality of the Brown franchise plan nor with anything except the effect upon competition of the acquisition by Brown of G. R. Kinney Co., Inc., and (b) that any history of concentration and vertical integration in the shoe industry is irrelevant to the question as to whether or not the Brown franchise plan constitutes an unfair method of competition in commerce in

violation of Section 5 of the Federal Trade Commission Act. The Court of Appeals was clearly correct in its conclusion (R. 589) that "the only similarity between this case and the previous *Brown Shoe Co.* decision, supra, is the fact that the same corporation is involved in both disputes."

B. The sufficiency of economic justification.

There can be no quarrel with the Commission's statement (Com. Br. 27-28) that "not all vertical arrangements are equally injurious to competition," and that "requirements contracts 'may well be of economic advantage to buyers as well as to sellers, and thus indirectly of advantage to the consuming public.' " That is the case here.

(a) **The economic justification for the Brown franchise plan.**

It will be seen that the Brown franchise plan is not only of economic advantage to Brown but to the dealers on the plan, and indirectly to the consuming public.

As for Brown, the plan, insofar as it helps to keep its dealers on the plan in business, financially successful, and able to sell more shoes to the consuming public, is of obvious economic advantage. As long as such dealers can sell Brown shoes at a satisfactory profit to themselves, they will tend to continue to buy from Brown. As for the dealers, the fact that, as found by the Commission (R. 591) and by the Court of Appeals (R. 72), their average rate of return on investment is 16%, or some 35% better than the industry average of 11.8%, should be ample evidence of the economic advantage to them. Again the Commission concedes (Com. Br. p. 28) that "To be sure, there are unquestionably real advantages and economies in making available to retailers the services which Brown supplies under its Brown franchise program."

As for the public generally, the services given by Brown to its dealers on the plan, aiding them to be successful in their respective undertakings, to be financially prosperous and stay in business, help to preserve, pro tanto, the small local businessman against the vigorous competition of the chain stores. They have the same salutary effect upon small independently owned retail stores that Congress sought to accomplish through the Small Business Act, 15 U. S. C. A., § 631, et seq., and as expressed in S. R. No. 1714, U. S. Code Congressional and Administrative News, 1958, p. 3071, where it is said that "The Small Business Administration has the following principal functions: * * * To provide technical and managerial aids to small business." This Court has pointed out in *Brown Shoe Co.,* supra, at p. 333:

> "Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business. Where an industry was composed of numerous independent units, Congress appeared anxious to preserve this structure."

In the case of *Standard Oil Co. v. United States,* 337 U. S. 293, it would appear that Mr. Justice Douglas felt so strongly about the necessity of preserving the small independent businessman that he dissented because in his opinion the effect of the majority opinion would be to eliminate the independent filling station operators saying, l. c. 321:

> "But there will be a tragic loss to the nation. A small, independent businessman will be supplanted by clerks. Competition between suppliers of accessories (which is involved in this case), will diminish or cease altogether. The oil companies will command an increasingly larger share of both the wholesale and the retail markets."

Instead of being condemned as unlawful, the Brown franchise plan should be encouraged because of its beneficial effects "upon the economic way of life sought to be preserved by Congress." *Brown Shoe Co.*, supra, l. c. 333.

(b) Answers to various statements in the Commission's brief.

The Commission would have Brown charge retailers for its services instead of giving them free, a suggestion which bears no relationship to the realities of the shoe industry or any other comparable industry. Even if Brown should take the Commission's advice and attempt to go into the business of advising, for a fee, retailers how to sell the shoes of other manufacturers, it would not be feasible for it to do so because its field men could not, as a practical matter, advise with respect to the proper merchandising of other manufacturer's shoes because of their lack of familiarity with their lines, the performance of particular models, etc. (R. 167-8, 268, 273, 301, 309, 319). Nor would the dealers be willing to pay Brown for advice with respect to the merchandising of other manufacturer's shoes when they feel that such advice, even when offered free, is only beneficial when they concentrate on Brown lines (R. 268).

It is true that there is no reason why the advantages, or most of them, of line concentration cannot be obtained by a retailer who purchases men's shoes from manufacturer A, women's shoes from manufacturer B, and infant's shoes from manufacturer C. It is also true that the great majority by far of all retailers follow this practice of line concentration, and do not purchase all of their lines from Brown or from any other single manufacturer. If they did not follow the policy of line concentration they would not remain in business very long.

But the Commission seems to argue that Brown should offer its services free to dealers who purchase any one of

Brown lines, rather than only to those who concentrate on Brown lines. The answer to this argument is given by one of the Commission's own witnesses, William Edward Freeman, who pointed out (R. 206), that although dealers need these services, his company, manufacturing only men's shoes, which constitutes only approximately 20% of a typical family shoe store's volume, could not afford to give such services for the entire operation. By the same token, neither can Brown afford to give these services, which are costly, to a dealer who purchases only 20% of his requirements from Brown, even if such services would be of any practical value in merchandising other manufacturer's shoes.

Brown does not contend that it is necessary that complete line concentration, i. e., concentration on one manufacturer's line of men's, women's and children's shoes is the only way in which a dealer can operate and be successful. Nor does it contend that dealers have to be, nor are they, held to the line by contractual agreement. All Brown does under the plan is to say to the dealers, in effect, that if you will concentrate on Brown lines, and do a good job with them, then so long as you do so we will help you. Of course, dealers do not need restrictions on their freedom of choice in order to achieve efficiency. But if they believe that the inducements offered tend to produce efficiency, and hence more profit, they may be willing to exercise their freedom of choice to concentrate on Brown lines.

It would seem that the Commission is contending (Com. Br. p. 30) that the burden is upon the manufacturer or producer of goods to "justify" the Brown franchise plan because it is claimed to be an exclusive dealing contract. We do not understand that to be the law, since, as we have pointed out above, they are not unlawful per se. Section 3 does not proscribe exclusive dealing contracts per se, but declares them to be unlawful if and only if

"the effect of such * * * contract * * * may be to substantially lessen competition or tend to create a monopoly in any line of commerce." When the prohibited effect has been found to exist, this Court has struck down exclusive dealing contracts. *Standard Oil Co. v. U. S.,* 337 U. S. 293. But where this Court has concluded that an exclusive dealing or "requirements" contract does not have the prohibited effect, then it has ruled that such an agreement does not fall within the proscription of Section 3. *Tampa Electric Company v. Nashville Coal Company,* 365 U. S. 320 (1960). A different rule applies with respect to contracts involving tie-in or arrangements having effects similar to that of a tie-in. In such cases it is only necessary that a not insubstantial portion of commerce is affected. *Atlantic Rfg. Co. v. Federal Trade Commission,* 381 U. S. 357 (1965); *United States v. Loew's, Inc.,* 371 U. S. 38 (1962); *International Salt Co. v. United States,* 332 U. S. 392 (1947).

The Commission in its brief (Com. Br. p. 30) appears to concede that there is no evidentiary support for its contention that the effect of the Brown franchise plan may be to "substantially lessen competition," and attempts to bring itself within the rule applicable to tie-in arrangements by repeating the statement from the decision of the Commission (R. 68) that the operation of the Brown franchise plan "is akin to the operation of tying clauses generally held as inherently anti-competitive," thereby seeking to avoid the necessity of showing a substantial lessening of competition. But the Court of Appeals in its decision, to which we refer for a detailed analysis of this contention (R. 585-9), has held it to be completely without merit.

C. There is no substantial adverse effect on competition.

However, the Commission, in the final portion of its brief (Com. Br. pp. 31-34), seems to abandon the proposi-

tion that it has shown that the Brown franchise plan is akin to the operation of tying clauses generally and, instead, to contend that there is evidentiary support for the proposition that the effect of the plan is to substantially lessen competition in the shoe industry. It seems to agree with the proposition in quoting from the decision of this Court in *Brown Shoe Co.,* supra, that it is "necessary to undertake an examination of various economic and historical factors in order to determine whether the arrangement under review is of the type Congress sought to proscribe." But we have pointed out at some length above that the plan is not of the type proscribed by Section 3, absent a showing of the requisite anticompetitive effects. The examination of the economic and historical factors is only required to determine such effects. The Commission concludes (Com. Br. pp. 31-32) that a "Review of those factors (see pp. 22-27 supra), which the court of appeals completely ignored, leads to the conclusion reached by the Commission, and by this Court before it in *Brown Shoe,* that the preemption by Brown of more than 700 retailers as its exclusive dealers tends substantially to lessen competition".

But the facts are (a) that the Court of Appeals did not completely ignore but distinguished the decision of this Court in *Brown Shoe;* (b) that the Commission in its decision did not come to the considered conclusion that the Brown franchise plan tends to substantially lessen competition (R. 68-69); (c) that this Court did not in *Brown Shoe* reach the conclusion "that the preemption by Brown of more than 700 retailers as its exclusive dealers tends substantially to lessen competition", nor was that issue before the Court; (d) the Brown franchise plan has not foreclosed or preempted, within the meaning of Section 3 of the Act, the market represented by the retailers on the plan; and (e) the effect of the Brown franchise plan is not sufficient to substantially lessen competition.

(a) **The Court of Appeals did not ignore but distinguished the decision of this court in *Brown Shoe Co.***

The Court of Appeals was presented with the same argument that is presented here, with respect to the interpretation to be given to footnote 66, pp. 337-8, to this Court's opinion in *Brown Shoe Co.*, supra. But instead of ignoring the argument met it head on and, after discussion, concluded (R. 589), "The only similarity between this case and the previous *Brown Shoe Co.*, decision, supra, is the fact that the same corporation is involved in both disputes".

(b) **The Commission did not come to the considered conclusion that the Brown franchise plan tends to substantially lessen competition.**

As pointed out above, the Commission came to the conclusion that the Brown franchise plan constitutes an unfair method of competition within the provisions of Section 5 because it is "akin to the operation of tying clauses generally held as inherently anticompetitive"; rejected Brown's contention that it was necessary to examine into the substantiality of its effect upon competition; and repeated the statement that it had found the plan to be violative of Section 5. Then, only as an afterthought, without analysis, discussion or explanation, and without indicating which standards of illegality under Section 3 it was referring to, merely stated that "the standards of illegality under Section 3 * * * of the Clayton Act, as amended, had been met" (R. 70).

(c) **This Court did not in *Brown Shoe Co.* reach the conclusion that the Brown franchise plan tends substantially to lessen competition.**

The Commission seems to be placing its primary reliance in this case upon this Court's decision in *Brown Shoe Co.*, supra, citing it no less than fourteen (14) times

in its brief. But the only thing found in *Brown Shoe Co.* which could even remotely be said to touch upon the Brown franchise plan is the footnote number 66, pp. 337-8, which merely says that Brown was able to exercise sufficient control over the dealers on the plan "to warrant their characterization as 'Brown' outlets for the purpose of measuring the share and effect of Brown's competition *at the retail level*" (Emphasis added).

However, we are dealing here with the effect of the plan at the manufacturing, not retail, level. The issue as to the legality of the plan was not before the Court.

(d) **The effect of the Brown franchise plan is not sufficient to substantially lessen competition.**

As pointed out above, under the Brown franchise plan there is no sale of shoes "on the condition, agreement, or understanding" that the purchaser "shall not use or deal in" the shoes "of a competitor or competitors" of Brown. It is merely an arrangement whereby so long as the dealer concentrates his business within the grades and price lines of Brown shoes, Brown gives him certain services and benefits not available to customers of Brown who do not so concentrate. In practice the concentration amounts, on the average, to approximately 75% of the dealer's business. The dealer is free to withdraw from the plan, and sometimes does, without notice whenever he sees fit to do so. There is no actual foreclosure of competitors and, if there is, it is only temporary and limited.

Furthermore, such temporary and limited foreclosure, if any, is, as this Court said in *Tampa Electric Co.,* supra, l. c. 333, "conservatively speaking, quite insubstantial."

The Hearing Examiner found (R. 28) that Brown's sales through the Brown franchise plan "are less than 1 percent of all shoes sold in the United States." The Commission found (R. 68), that "The stores under the franchise plan constitute approximately one percent" of "the 70,000 re-

tailers classified as retail shoe outlets" rather than approximately seven tenths of one percent of "the 100,000 retail outlets in the country which sold shoes in 1958." There are no figures in the record as to the total sales of shoes in dollars in either the year ending October 31, 1959, or in any other year, except an estimate of "approximately 3½ billion dollars" in Brown's Petition for Review (R. 43), from which the market share of the commerce involved could have been otherwise determined by the Commission or can be determined by this Court.

As pointed out above, this Court has held that an exclusive dealing or requirements contract may not be held to come within the prohibition of Section 3 unless it is inherently anti-competitive, which the Brown plan is not, or unless there is evidentiary support for a finding that the effect may be substantially to lessen competition. This Court has held, in *Tampa Electric Company,* supra, l. c. 333, that a requirements contract, definitely preempting for a period of twenty years competition to the extent of purchases worth perhaps $128,000,000, but only .77% of the total relevant market, did not fall within the proscription of Section 3, and that the proportionate volume of the relevant market preempted "is, conservatively speaking, quite insubstantial."

Similarly, in *FTC v. Motion Picture Adv. Co.,* supra, this Court approved a decision of the Commission condemning exclusive dealing contracts running for terms up to five years, the majority being for one or two years, covering 40% of the theaters in the area where respondent operated (respondent and three other companies having exclusive contracts with 75% of the market in the United States), but permitting such contracts for periods of up to one year.

Even if we assume that there are in effect written agreements in the form of Exhibit A to Brown's Answer (R. 12-

14) with every dealer on the Brown franchise plan, which there are not, and if we further assume that every such written agreement by its express terms requires every dealer to purchase 100% (not 75%) of his requirements from Brown, and if we further assume that such agreements are strictly enforced, which they are not, nevertheless the Brown franchise plan would not come within the proscription of Section 3 because, *inter alia,* the agreements, being terminable by the dealers at will whenever the dealer sees fit to do so, could not and would not operate to foreclose or preempt the market represented by such dealers. If a 100% requirements contract, binding upon both parties for a period of twenty years, affecting slightly less than 1% of the relevant market does not come within the proscription of Section 3 because the proportionate volume of the relevant market covered by the contract "is, conservatively speaking, quite insubstantial", then we respectfully submit that the Brown franchise plan, terminable at will by the dealer and by Brown upon thirty days' notice, affecting approximately 1% of the 70,000 shoe outlets in the country, could not have the effect of substantially lessening competition.

The Commission (Com. Br. p. 33) quotes from the footnote in *Brown Shoe Co.,* supra, that "the retailer was required, under this plan, to invest his own resources and develop his good will to a substantial extent in the case of Brown products." But, the fact is that every retailer of branded line shoes, whether manufactured by Brown or any other manufacturer, and whether or not on the Brown franchise plan, a similar plan of some other manufacturer, or not on any plan, must invest his own resources and develop his good will to a substantial extent in the sale of the brand of shoes he sells.

The Commission contends (Com. Br., pp. 31-33) that the number of retailers on the plan is increasing and "the

franchise program clearly appears as the growing edge of a continuous drive toward the foreclosure of retail outlets'' and the Commission should therefore forestall the growth of such foreclosure. But since it has taken Brown some forty years to persuade approximately 1% of the retail shoe outlets to join and adhere to its program, the threat which the Commission fears would seem to be remote indeed.

CONCLUSION.

We did not ask the Commission and do not ask this Court, as the Commission suggested (R. 69) ''to promulgate a higher standard of illegality for proceedings under Section 5 of the Federal Trade Commission Act than for actions under the Clayton Act''. But we do urge that where, as here, the Brown franchise plan involves nothing which by any stretch of the imagination could be deemed to be a ''deceptive practice'', nothing which is inherently anticompetitive, and nothing which could be deemed to be an ''unfair'' method of competition unless it can be said to come literally within the proscription of Section 3, then it must be judged by the same standards of illegality as those which would apply to a method of competition falling within the scope of Section 3, not lesser. The ultimate effect of the Commission's argument is that while the Brown franchise plan does not fall within the provisions of Section 3, it is the ''type'' of an arrangement proscribed by Section 3, and therefore, it was not necessary for the Commission to prove, and is not necessary for this Court to find, that the plan meets the tests of Section 3 in that the effect may be to substantially lessen competition.

Apparently what the Commission really seeks to accomplish in this case is to have this Court promulgate a rule to the effect that when the Commission, acting under Section 5, attacks as unfair a method of competition

which is not proscribed by the letter of Section 3, and is not inherently anticompetitive, but has only the characteristics of or is akin to a transaction proscribed by Section 3, then it is not necessary for the Commission to offer proof and make findings showing that the standards of illegality of Section 3 have been met; that under such circumstances all that is necessary for the Commission to do is to prove that it affects a not insubstantial portion of the relevant market and hence conclude that it constitutes a violation of Section 5. We respectfully submit that no such rule should be promulgated.

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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